(15) (10)

No. 84-28 AND 84-143
Consolidated

Supreme Court, U.S.
FILED
FEB 11 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH O. EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' JOINT REPLY BRIEF

KENNETH O. EIKENBERRY
Attorney General
CHRISTINE O. GREGOIRE
Deputy Attorney General
No. 84-143

DONALD C. BROCKETT
Spokane County Prosecutor
DAVID A. SARACENO
Deputy Prosecuting Attorney
No. 84-28

Attorneys for Appellants
Temple of Justice
Olympia, Washington 98504
(206) 753-6228

Charles P. Hamilton III
Jeffrey C. Sullivan
Richard C. Robinson
of Counsel

STATE PRINTING PLANT OLYMPIA, WASHINGTON

19 pp

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH O. EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' JOINT REPLY BRIEF

KENNETH O. EIKENBERRY
Attorney General

CHRISTINE O. GREGOIRE
Deputy Attorney General

No. 84-143

DONALD C. BROCKETT
Spokane County Prosecutor

DAVID A. SARACENO
Deputy Prosecuting Attorney

No. 84-28

Attorneys for Appellants
Temple of Justice
Olympia, Washington 98504
(206) 753-6228

Charles P. Hamilton III
Jeffrey C. Sullivan
Richard C. Robinson
of Counsel

TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT	1
A. Areas of Agreement and Disagreement	2
B. The Core of the Controversy	3
II. ARGUMENT	4
A. Appellees anticipatory challenge to the Washington State obscenity statute should be denied. The challenge rests on the construction of one word in a complex statutory matrix and "Our Federalism," warrants an opportunity for construction by the *state court*.	4
B. The Washington statute defines "prurient" within the paramaters of the judicial meaning ascribed to the term by this Court. This Court did not demand a single, fixed definition in *Roth-Miller*.	6
C. This Court is without *actual* facts or a *realistic* hypothetical supporting the contention of appellees. The examples proffered by the Court of Appeals are without merit while the actual material is that at which the Washington statute is aimed—hard-core pornography.	12
III. CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Adams Theatre Co. v. Keenan, 12 N.J. 267, 96 A.2d 519 (1953)	8
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	12
Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E.2d 840 (1945)	8
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	12
Ginzburg v. United States, 383 U.S. 463 (1966)	10

TABLE OF AUTHORITIES *(continued)*

Page

J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984) 12

Lewis v. City of New Orleans, 415 U.S. 130 (1974) ... 13

Miller v. California, 413 U.S. 13 (1973).....5, 9, 10, 13, 14

Mishkin v. New York, 383 US. 502 (1966) 5

Parmelee v. United States, 72 App.D.C. 203, 113 F.2d 729 (D.C. Cir. 1940) 8

Roth v. United States, 354 U.S. 476 (1957) 5, 7, 8, 9, 10, 14

Secretary of State of Md. v. Joseph H. Munson Co., ___ U.S. ___, 104 S.Ct. 2839 (1984) 12

Smith v. United States, 431 U.S. 291 (1977) 14

State v. Becker, 364 Mo. 1079, 272 S.W.2d 283 (1954) 8

State v. J-R Distributors, Inc., 82 Wn.2d 584, 512 P.2d 1049 (1973) 4, 5

United States v. One Book Called "Ulysses", 5 F.Supp. 182 (S.D.N.Y. 1944) 8

Ward v. Illinois, 431 U.S. 767 (1977) 5

Constitutions and Statutes:

Rev. Code Wash., ch. 2.60 5

Wash. Sess. Laws 1982, ch. 184, 47th Legis., H.B. 626 .....11, 13

Other Authorities:

Monaghan, *Overbreadth*, 1981 S.Ct.Rev. 21 5

F. Schauer, *Speech and Obscenity*, 67 Georgetown L. Rev. 899 (1979) 10

No. 84-28 AND 84-143
Consolidated

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

No. 84-28

DONALD C. BROCKETT,

Appellant,

v.

SPOKANE ARCADES, INC., et al.,

Appellees.

No. 84-143

KENNETH O. EIKENBERRY, in his official capacity as Attorney General for the State of Washington, et al.,

Appellants,

v.

J-R DISTRIBUTORS, INC., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' JOINT REPLY BRIEF

I.

SUMMARY OF ARGUMENT

Before replying directly to the arguments of the appellees, it may be helpful to try to delineate the areas of agreement and disagreement between the parties, and to show thereby the real core of this controversy.

A. Areas of Agreement and Disagreement

1. The parties agree that under *Roth* and *Miller*, obscenity is not constitutionally protected, states have a legitimate interest in the prohibition of obscene materials, and it is a proper state activity to prohibit the dissemination or exhibition of obscene materials.

2. While less clear, there appears to be no great disagreement as to what elements constitute obscenity under *Roth* and *Miller*—with one possible exception. To be more specific, there is no dispute at all over the meaning and application of the second and third prongs of the *Miller* three-prong test. And with respect to the first prong, there seems to be agreement that material encompassed by that prong—the "prurient interest" prong—must appeal to something other than the ordinary, normal, or "healthy" interest in sex. And that "something other" is determined by contemporary community standards. In short, there is agreement that the kinds of materials which so concerned the court below—automobile and perfume ads, for example—are not covered by the first prong of the *Miller* test.

3. There also appears to be agreement that those materials discussed by the Court of Appeals are not within the scope of the Washington statute. As pointed out in appellants' opening brief, even if they are within the scope of the first prong of the statutory test (though we contend they are not), they certainly are not within the second. The appellees seem to agree, for they do not now talk at all about materials of the sort discussed by the court below but, instead, conjure up other sorts of materials, which we shall discuss subsequently. The point here is simply that if a loose reading of the Washington statute does conceivably reach some protected speech there is much less of it than the court below speculated. We, of course, contend that the statute does not reach protected speech at all.

4. As noted by the appellees in their brief, the majority of state obscenity statutes include the term "prurient interest", as does the Washington statute, but, unlike the Washington statute, leave that term undefined. (Appellees' brief, p. 27). There seems to be no dispute that the

inclusion of that term, while leaving it statutorily undefined, is constitutionally permissible. Washington's statute is here under attack simply and solely because it does not leave "prurient" undefined but, instead, does define it, by using the phrase: "that which incites lasciviousness or lust".

B. The Core of the Controversy

We here reach the real area of dispute. Appellants acknowledge that there are some meanings of the term "lust" which if mechanically applied as an isolated term could render the statute capable of unconstitutional applications. These meanings are discussed in the opinion of the Court of Appeals. And appellees assert that we assign to "lust" those very meanings — an assertion which we emphatically deny. Appellees, however, are forced to concede that other meanings, including dictionary definitions, of the term "lust" are available which would not render the statute capable of unconstitutional applications.

Our purpose here is to point out the central question in this case: When there are meanings which would render a statute constitutional and others to the contrary, which meaning should be chosen? And which courts, state or federal, should do the choosing? Or to put it another way, should the federal court leave it to the state courts to do the choosing? And if the state courts are to do it, should the federal courts let the statute operate and have effect in the meantime?

Though we shall discuss the various available meanings of the term "lust" subsequently, we would here mention one point — which is a critical one. As we have already noted, many states' statutes leave the term "prurient" undefined. That term is used throughout the case law — as in *Roth* and *Miller* — and one must look to that case law for its meaning.

The term lust (or rather, "lustful thoughts") and the term "lascivious" are also used in the case law, i.e., in *Roth*. And we are simply suggesting that one must look to the same case law for the meaning of those terms as well.

Those terms should be treated just like the term "prurient" as used in the many state statutes which leave it undefined. Their meaning comes from the case law.

Further, though various meanings of the word "lust" are available which do not do violence to the word itself — in the sense that calling something "white" when it is really green or orange does violence to the term "white" — some of those meanings will do violence to the *statute*, by assigning a meaning which makes no sense in the context of that statute. And the meanings which the appellees would assign to the term do just that.

One last preliminary consideration, if this Court decides in appellants favor, there is the risk that the Supreme Court of the State of Washington would not do what we say it would do, and would assign to "lust" the meaning which appellees and the Ninth Circuit have assigned to it. We believe we can show this Court that for the state court to do so would be absurd, contrary to its past precedent, and therefore highly unlikely. See *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 512 P.2d 1049 (1973).

Against that risk should be weighed the result of deciding in favor of the appellees. Right now, the Washington statute is completely inoperative. The appellees can thus continue to disseminate to the public, material such as the picture magazine entitled "Tit and Body Torture". Indeed, we would suggest it is a near certainty that they will do so. Such a result should not be allowed. Appellees should be made to do that which they say they are doing — challenge the statute "as applied." (Appellees' brief, p. 39).

II.

ARGUMENT

A. APPELLEES ANTICIPATORY CHALLENGE TO THE WASHINGTON STATE OBSCENITY STATUTE SHOULD BE DENIED. THE CHALLENGE RESTS ON THE CONSTRUCTION OF ONE WORD IN A COMPLEX STATUTORY MATRIX AND "OUR FEDERALISM", WARRANTS AN OPPORTUNITY FOR CONSTRUCTION BY THE *STATE COURT*.

Appellees subject the Washington statute to a microscopic inspection, claiming the validity of an entire statute rests on the definition of prurient. One must remember, however, the term prurient is but one aspect of the "prurient interest" element, which, in turn, is only one of four elements comprising the first of a conjunctive three-pronged test of obscenity.

The test for obscenity is a holistic one. *All* three prongs of the *Miller* tripartite test must be met. Thus, while material may be impaled by the first prong of the obscenity test as set forth in *Roth*, it may only be labeled as obscene following application of the other two prongs. Likewise, all elements of the first prong itself must be met: whether the (1) average person, (2) applying contemporary community standards, would find that the work, (3) taken as a whole, (4) appeals to the prurient interest. *Miller v. California*, 413 U.S. 13, 24 (1973). Thus, even the first prong does not pierce the target based on the "prurient interest" element alone.[1]

Moreover, if there is *really* a question as to the meaning of "prurient" in the Washington statute it is a matter for the state courts.[2] And this Court is advised of the construction given by the Washington Supreme Court in the past when it construed a challenged obscenity statute consistent with *Roth-Miller*. See *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 601-602, 512 P.2d 1049, 1060 (1973).[3] In turn, this Court "invariably accepts the gloss the highest state court has placed on a state statute." Monaghan, *Overbreadth*, 1981 S.Ct.Rev. 21; citing *Ward v. Illinois*, 431 U.S. 767, 773-76 (1977).

---

[1]The real emphasis of the first prong has, by case law, been the "average person" (*Mishkin v. New York*, 383 U.S. 502 (1966); "contemporary community standards" (*Miller v. California*, 413 U.S. 13 (1973); and "taken as a whole" (*Roth v. United States*, 354 U.S. 476 (1957).

[2]Certification to the Washington State Court with regard to a question of state law is an available procedure. See Rev. Code Wash., ch. 2.60.

[3]Appellees argue that appellants bind the state to any statutory constructions offered by way of argument. On the contrary, the state courts, and particularly the State Supreme Court, binds the appellants.

Finally, a jury instruction under the Washington statute could readily be written within *Roth-Miller*. Thus the statute should be held constitutional and appellees microscopic inspection should be denied. Appellees' asserted "concern" for the understanding of a juror is without merit. *Miller* makes clear that the judicial meaning of obscenity can readily be translated for common understanding through jury instructions. Such instructions need not be made part of the statute for it to be deemed constitutional. On its face, the statute is constitutional.

B. THE WASHINGTON STATUTE DEFINES "PRURIENT" WITHIN THE PARAMETERS OF THE JUDICIAL MEANING ASCRIBED TO THE TERM BY THIS COURT. THIS COURT DID NOT DEMAND A SINGLE, FIXED DEFINITION IN *ROTH-MILLER*.

There is in reality, no question as to the definition of prurient. It is, in the Washington statute, a defined term. Rather, it is the term "lust" which is not defined by the statute. And that, according to the appellees, is the fatal flaw. In so arguing appellees and the Court of Appeals assign to *that* term a single, *fixed* definition denoting normal, healthy sex. Conversely, what meaning do appellants assign to the word "lust"? That and only that meaning which this Court assigns to it in the context of a definition of "prurient" clearly intended to track the *Roth-Miller* tests of constitutionally unprotected obscenity *and no more*.

Before addressing this point directly, we should state once again our own basic contention. In adopting the Washington statute, the legislature intended to reach as far as was constitutionally permissible under the decisions of this Court, but not one step beyond. Appellees contend that the legislature ventured into the arena of constitutionally protected speech by using the word "lust".

To answer that contention, one must take a brief look at this Court's decisions involving obscenity and the use in those decisions of the terms "lust" or "lustful thoughts". The judicial meaning of those terms, to be gleaned from

those decisions, implies an overall theme conveyed by another term — prurient. While a number of adjectives (such as shameful, morbid, unhealthy, lustful) may be used in describing that word, all are constitutionally acceptable if they convey that basic theme of pruriency. Thus, by defining prurient one also by necessity gives meaning to those adjectives. However, to be constitutionally acceptable, one must stay within the parameters first established in *Roth*, 354 U.S. 476, 487, n. 20 (1957).

Indeed, the *Roth* judicial meaning adopted in *Miller* has never been overruled and thus spells out the current state of the law upon which state legislatures may rely and upon which Washington did rely. Thus the question here presented is a simple one, what was the meaning ascribed to prurient by the *Roth* Court?

That question is addressed by footnote 20 in *Roth*. By reading that footnote as a whole and recognizing that it provides the parameters within which one can understand prurient, one can reconcile the cases relied upon by the Court, the jury instructions affirming the challenged convictions, and the concurring and dissenting opinions in *Roth*. For ease of reference, we repeat the footnote here.

> "Obscene material is material which deals with sex in a manner appealing to prurient interest.[20]
>
> [20]I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed, 1949) defines *prurient*, in pertinent part, as follows:
>
> "* * * Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. * * *"
>
> *Pruriency* is defined, in pertinent part, as follows:
>
> * * * Quality of being prurient; lascivious desire or thought
>
> See also, *Mutual Film Corp. v. Industrial Comm.*, 236 US 203, 242, where this Court said as to motion pictures: "* * * They take their

> attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to.* * * *" (Emphasis added)
>
> We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent Draft No. 6, 1957), *viz:*
>
> "* * * A thing is obscene if, considered as a whole its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. * * *" *Roth,* 354 U.S. at 487, n. 20. (Emphasis in original)

The Court specifically referred to the term "prurient" and defined it in the footnote by stating: "* * * *in other words* 'material having a tendency to excite lustful thoughts' ". *Id.* It is thus clear the *Roth* Court sanctioned a use of the term "lust" in defining "prurient". The Court also cited to prior case law which had described the test for obscenity by using the terms "lust" or "lustful". *Id.* at 489, n. 26.[4] In *Roth,* the convictions of both defendants were affirmed because the trial courts, in the words of this Court, "* * * followed the proper standard. Both courts

---

[4] *Parmelee v. United States,* 72 App.D.C. 203, 113 F.2d 729, 736 (D.C. Cir. 1940) (works are protected if "the erotic matter is not introduced to promote lust"); *United States v. One Book Called "Ulysses",* 5 F.Supp. 182, 184 (S.D.N.Y. 1933) ("The meaning of the word 'obscene' as legally defined by the co[illegible]nding to stir the sex impulses or to lead to sexually impure [illegible]houghts."); *State v. Becker,* 364 Mo. 1079, 1085, 272 S.W.2d [illegible] (1954) ("After applying the required tests all the mem[illegible] Court have concluded that the contents of these publicatio[illegible] to incite lascivious thoughts, arouse lustful desire, * * * ."); *Adams Theatre Co. v. Keenan,* 12 N.J. 267, 272, 96 A.2d 519, 521 (1953) ("The question is whether the dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire; * * * .' "); *Commonwealth v. Isenstadt,* 318 Mass. 543, 550, 62 N.E.2d 840, 844 (1945) ("A book is 'obscene' * * * if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire.")

used the proper definition of obscenity." *Roth*, 354 U.S. at 489. That definition, which was included in the jury instructions in both the *Roth* and companion *Alberts* case, used the term "lustful". *Id.* at 486.[5] The concurring opinion of Justice Harlan in *Roth* in turn meets the Court of Appeals and appellees' argument in the instant case head on. Justice Harlan logically concluded that if the "shameful or morbid" definition of the Model Penal Code was the only acceptable one the convictions of the defendants would, by necessity have been reversed. *Roth*, 354 U.S. at 500. The dissenting opinion in *Roth* also took special note of the language of the challenged jury instructions and acknowledged that the majority had accepted those instructions. *Roth*, 354 U.S. at 508-509. (Douglas, J., dissenting with Black, J.).[6] Neither the Court of Appeals nor the appellees refute or even acknowledge the language of the jury instructions questioned and affirmed by this Court in *Roth*.

It is thus clear the footnote (as above quoted) articulated a constitutionally acceptable meaning of prurient which includes the term lust. But *Roth* went further, allowing other alternative ways to define prurient, including itching, longing, lascivious, lewd, shameful and morbid. *Roth*, 354 U.S. at 487, n. 20. The Court again cited to previous case law using such words. In *Alberts*, the trial court

---

[5]The *Roth* instruction was: "The words 'obscene, lewd and lascivious' as used in the law, signified that form of immorality that has relation to sexual impurity and has a tendency to excite lustful *thoughts*." (Emphasis in original)

The *Alberts* instruction was: "whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires." (Emphasis in original) *Roth*, 354 U.S. at 486.

[6]Appellees simply misread a footnote in *Miller* quoting a concurring opinion of Chief Justice Warren in *Roth*. *Miller*, 413 U.S. at 35, n. 15. The quoted text refers to the importance of the defendant's commercial or business use of the questioned materials. *Roth*, 354 U.S. at 496 (Warren, J., concurring). In *Miller*, the Court refers to the concurring opinion in distinguishing protected speech from the dissemination of pornography for commercial gain. *Miller*, 413 U.S. at 35. In fact, the concurring opinion on the subject of defining obscenity specifically referred to "lustful desires". *Roth*, 354 U.S. at 494.

instruction included the term "lascivious", which is also in the Washington statute. *Roth*, 354 U.S. at 486. Justice Harlan also addressed this point directly after he rejected the suggestion that shameful or morbid was *the only* definition. Obviously referring to footnote 20, he concluded, "The Court merely assimilates the various tests into one indiscriminate potpourri." *Roth*, 354 U.S. at 500. This "potpourri" nonetheless conveys the parameters within which state legislatures must stay, and Washington did stay, in regulating obscenity.

What we are saying is that "lust" or "lustful thoughts", as used in those cases have a certain meaning which stays within the parameters established by this Court. Therefore, the word "lust" as used in the Washington statute is to be given that same meaning so as to stay within the same parameters.

Thus, in addressing the question of what is meant by lust, within the judicial meaning of prurient, it is clear what that term does *not* mean. As thus used, it does not denote a healthy, wholesome interest in sex. It does not refer to mere sexual stimulation.[7] Rather, in context, it generally encompasses a lewd, lascivious, unhealthy, unwholesome, shameful, or morbid interest in sex. All such adjectives are intended to convey the same basic theme, and that theme is *not* healthy and wholesome. Interest-

---

[7]Appellees misconstrue appellants' argument on this point. The *purpose* as stated by appellants, behind the prurient appeal requirement, is to distinguish protected speech (intellectually stimulating) from unprotected speech (sexually stimulating, exciting, erotically arousing). *Miller*, 413 U.S. at 18, n. 2; *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). "The concept fundamental to the *Miller* test is that material appealing to the prurient interest *is* sex, and not merely describing or advocating sex. Material that appeals to the prurient interest is material that turns you on. Period." F. Schauer, *Speech and Obscenity*, 67 Georgetown L.Rev. 899, 928 (1979). (Emphasis in original). The appellees seize upon this point and argue that appellants have given to "lust" a "fixed meaning" which necessarily includes a normal, "healthy" or "wholesome" reaction to any sort of visual sexual stimulus. Indeed, the appellees' major argument is based entirely upon this "fixed meaning". See Appellees' Brief, p. 11-14, under the heading "The Position of the Parties". The appellees therein completely misstate appellants' position.

ingly, the Court of Appeals apparently accepted the term "lasciviousness" as connoting something other than healthy, wholesome. To argue that lust does not is simply inconsistent. One cannot logically believe that the Washington Legislature in using "lasciviousness" meant unhealthy, unwholesome while in using "lust" it meant the opposite. The words clearly and logically were meant to be consistent — with neither meaning healthy or wholesome.[8] Further, we note that appellees agree with one amicus that "prurient" means unhealthy or unwholesome. (Appellees' brief, p. 12) Why, then, do they contend that there is but one single, fixed constitutionally accepted definition of that term? Do shameful, morbid, unhealthy and unwholesome all mean the same thing — either by dictionary definition or contemporary usage? No. But they all do convey a theme and are within the parameters of *Roth*. So, too, do lust or lascivious. As a matter of fact, contrary to appellees' assertions, it is their single, fixed definition which invites constant litigation to ascertain "today's" meaning. On the other hand, a judicial meaning remains constant. Traditional guidelines provided by this Court would give way to contemporary slang or jargon under appellees argument.

One last comment regarding *Roth*, by the inclusion of footnote 20, the Court apparently thought that it would be helpful to give some sort of definition to the term "prurient", and that it would also be helpful to use the terms "lustful thoughts" and "lasciviousness" in that definition. The drafters of the Washington statute were obviously thinking along the same lines, for they used the same or similar words, as though lifted directly from that footnote. Thus, it would be absurd to suggest that those terms, as used in the footnote, connote something other than healthy or wholesome — which they clearly do — while the same or similar terms in the Washington statute do not.

Appellees' entire argument rests on the premise that

---

[8]"(8) 'Prurient' means that which incites lasciviousness or lust." Wash. Sess. Laws 1982, ch. 184, 47th Legis., H.B. 626 § 1(8); JS G-2. It is clear from the definition that the word "incites" conveys an exacerbated, not healthy, interest in sex.

under the Washington statute the "contemporary community standards" element of the first prong is made meaningless. (Appellees brief, p. 7-8, 21-24). To the contrary, that "standard" supports the position of appellants. Prurient means that which this Court ascribed to it, not healthy or wholesome. That judicial meaning is carried out in the Washington statute. The "contemporary community standards" element continues to have the same import it did in *Roth-Miller*.

C. THIS COURT IS WITHOUT *ACTUAL* FACTS OR A *REALISTIC* HYPOTHETICAL SUPPORTING THE CONTENTION OF APPELLEES. THE EXAMPLES PROFFERED BY THE COURT OF APPEALS ARE WITHOUT MERIT WHILE THE ACTUAL MATERIAL IS THAT AT WHICH THE WASHINGTON STATUTE IS AIMED — HARD-CORE PORNOGRAPHY.

Unlike most overbreadth cases, this Court has here been deprived of *any* actual facts alleging an unconstitutional application of the challenged statute. See *Secretary of State of Md. v. Joseph H. Munson Co.*, ___ *U.S.* ___, *104 S.Ct. 2839 (1984); Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Thus, the Court is left only with hypothetical situations. There are no facts to focus and give meaning to the issues presented. The problem with such judicial speculation is made vividly clear by the Court of Appeals' notion of a necessity, under the challenged statute, "to hale into court our leading couturiers, perfumers, and manufacturers of soft drinks, soap suds and automobiles * * *." *J-R Distributors, Inc.*, 725 F.2d 482, 492 (9th Cir. 1984); JS A-20, A-21. In so hypothesizing, the Court of Appeals failed to consider the judicial meaning of prurient and the conjunctive tripartite test for obscenity under the statute; namely, the required "patently offensive" representations or descriptions. Appellees have failed to recognize that the hypotheticals provided by the Court of Appeals fail not only under the second prong but the first as well, assuming the ads appeal only to a healthy, wholesome interest in sex.

It is interesting to note that appellees provided no evidence at trial and have *throughout* this litigation failed to provide even a hypothetical situation in which the statute, by its definition of prurient, would apply to constitutionally protected speech. On the other hand, the only material before the trial court and Court of Appeals provides a clear example of a constitutional application.[9] Obviously, appellees' attack on the facial validity of the Washington statute thus places this Court in the position of arbitrating hypothetical grievances without the benefit of statutory interpretation by the state court. To do so reduces this Courts' "* * * function to passing words in the context of imaginary events." *Lewis v. City of New Orleans*, 415 U.S. 130, 137 (1974) (Blackmun, J., dissenting).

It is presumed the Washington Legislature intended the challenged statute to be constitutional. This is obvious from the statute's adoption of the precise language of the *Miller* tripartite test. *Miller*, 413 U.S. at 24; Wash. Sess. Laws 1982 ch. 184, 47th Legis., H.B. 626; JS G-1. In defining "prurient", the legislature complied with *Roth* and *Miller*. Thus in this, a facial challenge, the statute is constitutional. Should this Court undertake to further define "prurient", or "lust", it would not render the statute unconstitutional. Prurient means what this court says it does. If the Washington statute is unconstitutional, then by necessity *Roth* and *Miller* should be reversed.

---

[9]The only material made available to the trial court was appellants' (defendants') appendix, a magazine entitled "Tit and Body Torture". The magazine was offered by appellants to show the legitimate scope of the challenged statute. Appellees vigorously opposed the admission of the document by a motion to strike, denied by the trial court in an order dated June 8, 1982. On March 28, 1983 appellees again moved to strike the document from the record on appeal, denied by the panel hearing the oral argument.

III.

CONCLUSION

The appellees, here aided by the Court of Appeals, attempt to deprive the states of the ability to legislate their own laws in the area of obscenity. *Miller* cautioned this was not the function of the courts. *Miller*, 413 U.S. at 25. Appellees replace the judicial *meaning* of prurient with one single, fixed *definition*. Appellees' microscope inspection of the Washington statute demands impossible precision which *Roth* held not to be required in the terminology used in state obscenity statutes. *Roth*, 354 U.S. at 491; *Miller*, 413 U.S. at 27-28. Further appellees would require a state legislature to freeze a jury to their single, fixed definition — invading the purpose and province of jury instructions. *Smith v. United States*, 431 U.S. 291, 302 (1977). The Washington Statute is facially constitutional in that it fits within the paremeters set by this Court in *Roth* and *Miller*.

For these reasons, appellants respectfully request this Court reverse the decision of the Court of Appeals.

DATED this _____ day of February, 1985.

Respectfully Submitted,

KENNETH O. EIKENBERRY
Attorney General

CHRISTINE O. GREGOIRE
Deputy Attorney General

DONALD C. BROCKETT
Spokane County Prosecutor

DAVID A. SARACENO
Deputy Prosecuting Attorney

Charles P. Hamilton III
Jeffrey C. Sullivan
Richard C. Robinson
of Counsel

Temple of Justice
Olympia, Washington 98504
(206) 753-6228